HANSELL & POST
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

THIRTY-THIRD FLOOR FIRST ATLANTA TOWER
ATLANTA, GEORGIA 30383-3101
TELEPHONE 404 581-8000
TELECOPIER 404 581-8330
TELEX 54-2711

56 PERIMETER CENTER EAST, N.E.
FIFTH FLOOR
ATLANTA, GEORGIA 30346-2283

1915 "I" STREET, N.W.
FIFTH FLOOR
WASHINGTON, D.C. 20006

CHARLES T. ZINK
404 581-8150

RECEIVED
DEC 28 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

December 28, 1983

LODGING

Honorable Alexander L. Stevas
Clerk
United States Supreme Court
Washington, D. C. 20543

Re: State Board of Equalization of the State of Georgia, et al. v. Southern Railway Company, et al.
United States Supreme Court
No. 83-886

Dear Mr. Stevas:

I am lodging with you herewith copies of the following cases which are unpublished, and to which reference is made in the Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed simultaneously herewith:

1. Southern Pacific Transportation Co. v. California, No. C 81-4848 S.W. (N.D. Cal., filed September 1, 1982).

2. Trailer Train v. State Board of Tax Commissioners, No. IP 82-45-C (S.D. Ind., filed November 3, 1982).

3. Burlington Northern R. R. v. Bair, Civ. No. 83-100-A (S.D. Iowa, filed June 17, 1983).

4. Chesapeake and Ohio Railway Company, et al. v. Herschel H. Rose, III, Tax Commissioner, etc., et al., No. 82-2564 (S.D. W.Va., filed August 22, 1983).

Very truly yours,

Charles T. Zink

CTZ/tl
Enclosures

SEP 10 19??

RECEIVED
DEC 28 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, STATE BOARD OF EQUALIZATION, et al.,

Defendants.

No. C 81-4848 SW

ORDERS

In this action, plaintiff Southern Pacific Transportation Company ("Southern Pacific") and some of its subsidiaries challenge many aspects of defendant State Board of Equalization ("Board") valuation of its rail transportation property between 1979 and 1981. Southern Pacific's complaint involves a general challenge to California's taxation of rail transportation property under federal law and a series of specific attacks upon decisions by the Board to tax certain items of transportation property.

This matter came before the court on the Board's Motion for Abstention. After careful consideration of the briefs and arguments of counsel, the court hereby grants defendants' motion as to all claims except those involving challenges under the 4-R Act, 49 U.S.C. § 11503.

BACKGROUND

Plaintiff Southern Pacific and many of its subsidiaries are corporations authorized to do business in the State of California. For the tax years 1979-82, the Board purportedly valued plaintiffs' rail transportation property as of the lien date for each tax year. In making its assessments, the Board apparently determined a unitary true market value by combining the value of some of Southern Pacific's multistate transportation property, the value of the California single state rail transportation property of the other plaintiffs and the value of the property of the St. Louis Southwestern Railway Co. ("St. Louis"), a company substantially owned by Southern Pacific. The Board then allocated a portion of such combined value to California as the unitary value of plaintiffs' rail transportation property in this state.

In addition to challenging the allocation of some of the value of St. Louis' property to California, plaintiffs complain of several isolated decisions by the Board. For example, plaintiffs have attacked the Board's ruling that Southern Pacific's interest in the Los Angeles Passenger Terminal and in its passenger commute operation between San Francisco and San Jose should be separately assessed. Additionally, plaintiffs attack an escape assessment levied against plaintiffs for tax year 1981-82 purportedly to remedy an underassessment in 1979. Finally, Southern Pacific complains of the Board's decision to assess to it an executive aircraft owned by St. Louis and an aircraft leased from a third party.

In each of the tax years in question, Southern Pacific filed timely petitions for reassessment, for rescission of assessments and for abatement of penalties with the Board.

With respect to the challenges relevant hereto, the Board denied Southern Pacific's petitions. Following these denials, plaintiffs paid to the defendant counties each installment of the disputed taxes before such installment became delinquent. Plaintiffs then elected to file the instant lawsuit in this court.

In this action, plaintiffs seek injunctive and declaratory relief as to the state taxes involved herein. For their first legal theory, plaintiffs allege that the Board violated section 306 of the 4-R Act, 49 U.S.C. § 11503, which prohibits a state from levying or collecting a property tax "on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction." See Trailer Train Co. v. State Board of Equalization (II), 511 F. Supp. 553 (N.D. Cal. 1981). Specifically, plaintiffs allege that the Board's interpretation of Proposition 13 (now Cal. Const. art. XIIIA), its valuation of plaintiffs' transportation property for assessment purposes, its escape assessment, and the existence of a business inventory exemption for other taxpayers all constitute violations of the 4-R Act.

Plaintiffs also allege that the inclusion of St. Louis' property in Southern Pacific's unitary property violates the due process clause of the fourteenth amendment to the United States Constitution because it permits a state tax on property located outside of California. In addition, plaintiffs contend that these actions violate the commerce clause, U.S. Const. art. I, § 8, cl. 3, because of their effect on interstate commerce.

//

//

//

Plaintiffs' final arguments arise as pendent claims brought under state law. Specifically, plaintiffs argue that the Board failed to comply with Article XIIIA of the California Constitution in assessing plaintiff's property by reference to its current true market value. Furthermore, plaintiff's argue that the Board failed to follow accepted appraisal methods which produced results in violation of California law. Finally, plaintiffs allege that the Board's assessment to Southern Pacific of the two aircraft was in violation of California Revenue and Taxation Code § 5362.

DISCUSSION

The Board now seeks to have this court abstain as to the plaintiffs' entire complaint. Abstention is a judicially created doctrine under which a federal court declines to excercise jurisdiction so that a state court or agency will have an opportunity to settle the question. The doctrine was federally generated and arises out of a desire to avoid unnecessary conflicts between the federal judiciary and state government. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

A. The 4-R Act Claims

The Board would have this court abstain as to the challenges to the state court taxes, not on the basis of a statutory prohibition, but rather out of a concern for comity. However, abstention from the exercise of federal jurisdiction "is the exception, not the rule." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). Thus, this court will not abstain unless the requirements formulated under that doctrine are strictly met under the particular claims under question.

The Board suggests that this court should abstain under the Burford category of abstention which takes its name from Burford v. Sun Oil Co., 319 U.S. 315 (1943). The purpose of Burford abstention is to avoid "federal intrusion into matters which are largely of local concern and which are within the special competence of local courts." International Brotherhood of Electrical Workers, 614 F.2d 206, 212 (9th Cir. 1980).

This court's analysis of the Burford doctrine must begin with the observation that this circuit has carefully limited its applicability to cases where (1) the state has chosen to concentrate suits to a particular court; (2) the federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and (3) federal review might disrupt state efforts to establish a coherent policy. Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374, 377 (9th Cir. 1982).

In the present case, it appears that a Burford dismissal is inappropriate.[1/] An examination of the applicable criteria reveals that this is not the kind of case which is largely local in character nor one in which federal intervention has been deemed unwarranted. In fact, the legislative history behind section 306 demonstrates a reasoned and well thought-out decision to permit federal intervention to remedy state discrimination. Congress clearly envisioned a federal forum to implement a national policy. S. Rep. No. 91-630, 91st Cong., 1st Sess.; The Atchison, Topeka & Santa Fe Railway Co. v. Lennen, Nos. 80-4172, 4173, 4176, 4181 (D. Kan. April 15, 1981

1/ It is also apparent that Pullman abstention is inappropria because no federal constitutional issue would be avoided by a state court determination of pertinent state law. Knudsen Corp. v. Nevada State Dairy Commission, supra.

Furthermore, Congress expressly found that federal judicial intervention was required in cases arising under this section because it created an exception to the state tax anti-injunction statute. 28 U.S.C. § 1341.

Accordingly, this court declines to abstain from deciding claims that arise under the 4-R Act. Abstention can only be justified under exceptional circumstances involving obvious intrusion into purely local affairs. In this case, where both Congressionally defined policy and judicial observations confirm the need for federal intervention, abstention is inappropriate.

B. Constitutional and State Law Claims

Defendant also seeks to have this court abstain as to the other aspects of plaintiffs' complaint. These claims, which raise federal constitutional questions, do implicate values of comity and state sovereignty while not evincing any countervailing federal interest such as in the 4-R Act claims. Therefore, in light of the sensitive and extremely local nature of these claims and the long-standing federal deference to state taxation cases, the court concludes that the requisite special circumstances warranting Pullman abstention are present here.[2/]

The Ninth Circuit has established three prerequisites to abstention under the Pullman doctrine:"(1)The complaint 'touches a sensitive area of social policy upon which the federal courts ougnt not to enter unless no alternative to its adjudication is open.' (2) 'Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.'

2/ Abstention under the Burford doctrine would be inappropri even as to these claims. There has been no showing that these suits are confined to a particular court. See, e.g., Isthmus Landowners Assoc., Inc. v. California, 601 F.2d 1087 (9th Cir. 1979); Santa Fe Land Improvement Co. v. Chula Vista 596 F.2d 838 (9th Cir. 1979).

(3) The possibly determinative issue of state law is doubtful." Canton v. Spokane School Dist., 498 F.2d 840, 845 (9th Cir. 1974)(quoting Pullman supra.).

As to the non-4-R Act claims in this case, the Canton requirements have been met. First, it is well-settled that absent other countervailing factors, [3/] federal courts should not interfere in the entirely local and sensitive area of the collection of state taxes. See Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298-99 (1943). This is particularly true when, as in the present case, the decisions being challenged involved isolated interpretations by a state agency of state tax regulations.

Second, it is entirely possible that a state court challenge, such as is involved in ITT World Transport v. San Francisco, Sup. Ct. No. 771 841, may well obviate the need to determine the constitutional questions in this litigation. A state court could well rule, on a variety of state grounds, that St. Louis' property should not have been included in the value of Southern Pacific's unitary property.

Finally, the question of whether the Board properly included St. Louis' property with Southern Pacific's is a question which turns on complicated and controversial interpretations of state law. It is unclear whether the assessment in the instant case on the basis of the definition of "operating unit" would be permitted under state law. This court, therefore, does not claim the ability to predict what a state court would do. See Santa Fe Land Improvement Co. v. Chula Vista, supra at 841.

Abstention in this case is necessary to avoid needless conflict with the administration by a state of its own

---

3/ With respect to claims under the 4-R Act, federal intervention is not only warranted under federal law it is also necessary in order to remedy general discriminatory practices with a lengthy history.

affairs. Except as it concerns challenges approved by a statute with an express exemption from 28 U.S.C. § 1341, a suit attacking local tax decisions should be stayed pending resolution of any dispositive state law issues. Federal courts should not assume the functions of a State-wide court of tax appeals. Cf. Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 464 (D. Md. 1978).

The court cannot hear plaintiffs' constitutional and state law challenges to California's attempt to tax their rail transportation property for an even more fundamental reason. It is now well-recognized that absent statutory exemption, [4/] 28 U.S.C. § 1341 restricts federal jurisdiction in cases involving state tax administration. Section 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Section 1341 has its roots in equity practice, in the principles of federalism and in recognition of a state's need to administer its own fiscal operations. Tully v. Griffin, Inc., 429 U.S. 68 (1976). Furthermore, this section has been held to apply to cases, such as the instant one, which seek declaratory relief or make federal constitutional challenges. Capitol Industries-EMI, Inc. v. Bennett, Nos. 80-4113, 80-4114 (9th Cir. July 22, 1981).

In the present case, plaintiffs' remedies in state court are adequate. Mandel v. Hutchinson, 494 F.2d 364, 367 (9th Cir. 1974); Pacific Gas & Electric Co. v. State Board of Equalization, 27 Cal. 3d 277 (1980). A single

4/ As indicated elsewhere in this memorandum, such an exemption exists for claims under the 4-R Act.

action against the Board in a target forum would accomplish the coordinated result plaintiffs desire. Accordingly, the court is without jurisdiction over the non-4-R Act claims and, they must be dismissed.

CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' claims which do not arise under section 306 of the 4-R Act, 49 U.S.C. § 11503, are dismissed.

IT IS FURTHER ORDERED that plaintiffs' claim as alleged in Paragraph 18C of their complaint is dismissed. See Trailer Train Co. v. State Board of Equalization (II), 538 F. Supp. 509 (N.D. Cal. 1982).

IT IS FURTHER ORDERED that plaintiffs' complaint against the individual defendants is dismissed.

IT IS SO ORDERED.

DATED: -1 SEP 1982

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TRAILER TRAIN COMPANY, RAILBOX COMPANY, RAILGON COMPANY, Plaintiffs, -vs- STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF INDIANA, JOHN M. HUIE, GORDON E. McINTYRE, DURWOOD S. STRANG, As members of the State Board of Tax Commissioners of the State of Indiana, INDIANA DEPARTMENT OF STATE REVENUE, WILLIAM D. HAHN, As Commissioner of the Indiana Department of State Revenue, Defendants.	)	NO. IP 82-45-C

ENTRY

This case is before the Court on the defendants' motion to dismiss. For the reasons stated below, the motion is denied.

Background

The plaintiffs are Delaware corporations with their principal offices in Illinois. They are in the business of furnishing railroad cars to rail corporations. The defendants are the Indiana Board of Tax Commissioners and its members and the Indiana Department of State Revenue and its commissioner.

The defendants assessed the plaintiffs' property for an ad valorem property tax and collected a tax in 1981 pursuant to Ind. Code §§ 6-1.1-8-1 — 6-1.1-8-43 (1978 and Supp. 1982). The plaintiffs contend that the assessment violates section 306 of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1982).

Under that section, a state may not assess rail transportation property used in interstate commerce at a rate higher than that used to assess other commercial and industrial property. Nor may it levy or collect a tax based on such an assessment.

The plaintiffs filed suit seeking an injunction directing the defendants to reduce their assessments of the plaintiffs' property and issue refunds based on the reduced assessments. They also requested a declaratory judgment that the defendants' 1981 assessment, levy and collection of the ad valorem tax on their property violated section 306. The defendants responded with a motion to dismiss, contending (1) that the plaintiffs had failed to allege that no adequate remedy at law existed and thus were not entitled to equitable relief, and (2) that the plaintiffs had not exhausted administrative remedies.

Discussion

I. Prerequisites to equitable relief

It is traditional that the availability of equitable relief depends on a showing that no adequate remedy at law exists and that irreparable harm would result without equitable intervention. These prerequisites do not apply in the case of section 306, however. This section has been interpreted to authorize district courts to grant injunctive relief in enforcing the section's substantive provisions. Atchison, T. & S.F. Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981); Tennessee v. Louisville & N. R.R., 478 F.Supp. 199, 210 (M.D.Tenn. 1979), aff'd, 652 F.2d 59 (6th Cir. 1981), cert. denied, 454 U.S. 834, 102 S.Ct. 135, 70 L.Ed.2d 114 (1981). Where an injunction is authorized by statute it is not necessary for a plaintiff to establish the existence of the traditional equitable prerequisites. Id. The first ground for the defendants' motion to dismiss therefore does not apply in this instance. Accord, Ogilvie v. State Board of Tax Commissioners, No. IP 81-1203-C (S.D.Ind. May 4, 1982).

II. Exhaustion of administrative remedies

It is a general principle that recourse to the courts is not permitted if a party has not exhausted available administrative remedies. This doctrine is not jurisdictional, but discretionary. NLRB v. Industrial Union of Marine and Shipbuilding Workers Local 22, 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968).

In this case the exhaustion doctrine does not govern. Section 306 was enacted precisely because existing state administrative proceedings had proved cumbersome, and a quicker and more efficient remedy was needed for railroads seeking to alleviate disproportionate tax burdens. Clinchfield R. Co. v. Lynch, 527 F.Supp. 78 785 (E.D.N.C. 1981), citing S.Rep. No. 1483, 90th Cong., 2d Sess. 4-7 (1968); S.Rep. No. 630, 91st Cong., 1st Sess. 7-8 (1969). It would defeat this purpose to require prior resort to the very remedies which the statute was meant to supplant.

Further evidence of the intent of Congress to provide railroads a direct judicial avenue of redress is supplied by the language of subsection (c) of Section 306, 49 U.S.C. § 11503(c), which specifically precludes the application of the Tax Injunction Act, 28 U.S.C. § 1341 (1976). Section 1341 provides that district courts shall not enjoin state tax procedures where a "plain, speedy and efficient" state remedy is available. By declaring section 1341 specifically inapplicable in cases involving section 306, Congress manifested its intent that access to federal district court be open even in instances where state relief might also be available.

For these reasons it is clear that the exhaustion doctrine has no application to this case. Accordingly, the defendants' motion to dismiss is denied.

Dated this 3 day of November, 1982.

S. Hugh Dillin, Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
JUN 17 1983
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff,

vs.

GERALD D. BAIR, Director of the Department of Revenue of Iowa,

Defendant.

CIVIL NO. 83-100-A

ORDER

On March 22, 1983 defendant filed a motion to dismiss and an application for discretionay abstention. Plaintiff resisted these motions on April 14, 1983.

Defendant alleges that the proper parties have not been joined and thus the complaint should be dismissed. In its order of April 4, 1983 the Court determined that defendant was the proper party needed for the issues raised in the complaint. Defendant also alleges failure to state a claim upon which relief can be granted. Viewing the complaint in the light most favorable to plaintiff it appears the plaintiff has alleged facts which, if proven may allow relief to be granted pursuant to 49 U.S.C. § 11503.

Lastly, defendant alleges that the court lacks subject matter jurisdiction over this case. Clearly 49 U.S.C. § 11503 gives the Court jurisdiction to decide the questions raised here. The statute creates a cause of action against discrimination in the assessment of property taxes on rail transportation property.

The district courts of the United States are given jurisdiction without regard to the amount in controversy, citizenship of the parties or 28 U.S.C. § 1341. Thus court will not dismiss for lack of subject matter jurisdiction.

Abstention

Defendant requests that the Court apply the abstention doctrine to this case because of questions of state law raised in the complaint. The first type of abstention cited by defendant is the Pullman type. That doctrine requires federal courts to abstain from deciding constitutional questions which may be decided by state law. Clearly the complaint has not presented a constitutional challenge to the state law here, thus Pullman is inapplicable.

The other type of abstention is the so-called Burford type. This states that federal courts should abstain from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. However, the Congress intended that this type of question be determined in the federal courts. The State Tax Injunction Act, 28 U.S.C. § 3141, was made inapplicable to cases brought under 49 U.S.C. § 11503. Congress created this cause of action because it felt that state law remedies were inadequate. "Congress does not desire the federal courts to apply the court-created doctrine of abstention to claims under the act." Atchison, Topeka and Santa Fe Railway v. Arizona, No. CIV 81-1297, 81-1298 (D.C. Ariz, 1983). Accordingly, the Court will not apply the abstention doctine in this case.

IT IS THEREFORE ORDERED that defendant's Motion to Dismiss shall be and is hereby denied for the aforementioned reasons.

IT IS FURTHER ORDERED that the Court will not abstain in this case because of the inapplicability of the abstention doctrine to the facts present here.

Signed this 17th day of June, 1983.

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

THE CHESAPEAKE AND OHIO RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; and WESTERN MARYLAND RAILWAY COMPANY,

Plaintiffs

v. Civil Action No. 82-2564

HERSCHEL H. ROSE, III, Tax Commissioner of the State Tax Department of West Virginia; and JON H. SNYDER, Director, Business Tax Division, State Tax Department of West Virginia,

Defendants

MEMORANDUM ORDER

This matter is before the court on the motion of defendants for judgment on the pleadings in the above-styled civil action. Such a motion may be appropriately granted only when the pleadings show that no material facts are in dispute and the moving party is entitled to judgment as a matter of law. King v. Gemini Food Service, Inc., 438 F. Supp. 964, 966 (E.D. Va. 1976), aff'd on other grounds, 562 F.2d 297 (4th Cir. 1977), cert. denied, 434 U.S. 1965 (1978). The facts presented in the pleadings and the inferences to be drawn therefrom are to be viewed most favorably to the non-moving party. Beal v. Missouri Pacific R. R. Corp., 312 U.S. 45 (1941).

I.

Plaintiffs in this action are three interstate common carriers by railroad who are each qualified to do and in fact do business in the State of West Virginia. Their complaint, which is brought under the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), Pub. L. No. 94-210, § 306, 90 Stat. 54 (1976), 49 U.S.C. § 11503,[1] seeks injunctive and declaratory relief against the defendants from what are alleged to be discriminatory state business taxes assessed for tax years 1973 through 1982 and expected to be assessed for future years. Defendants, who are responsible for the assessment and collection of business taxes levied on railroads

---

[1] This court will follow the Fourth Circuit in referring to the original text of § 306 for purposes of analysis.

> In accordance with Pub. L. No. 95-473, 92 Stat. 1466 (1978), § 306 was moved from its original location at 49 U.S.C. § 26c and certain changes in language were made. The statute calling for recodification of the Interstate Commerce Act makes clear, however, that the changes in language were not to affect the substance of § 306. See also H. Rep. No. 1395, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 3009. As the parties, the district court, and other courts, see, e.g., Alabama Great Southern R.R. v. Eagerton, 663 F.2d 1036 (11th Cir. 1981); Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir. 1981), cert. denied, 454 U.S. 1086 (1981); but see State of Arizona v. Atchison, T. & S.F. R.R., 656 F.2d 398 (9th Cir. 1981), have done, we will refer to the original text of § 306 for purposes of analysis.

Clinchfield Railroad Company, et al. v. Lynch, 700 F.2d 126, 128 (4th Cir. 1983).

by the State of West Virginia, deny generally that the taxes at issue are discriminatory. As grounds for their motion for judgment on the pleadings, defendants contend that: (1) this court lacks jurisdiction over the subject matter of this action because plaintiffs have failed to exhaust their administrative remedies; (2) this court should abstain from exercising its jurisdiction; (3) the statute invoked does not apply to the taxes at issue; (4) plaintiffs have failed to state a claim upon which relief can be granted inasmuch as the taxes at issue are not discriminatory as a matter of law; and (5) the statute does not apply to tax years prior to 1979.

Plaintiffs have premised this action on section 306(1)(d) of the 4-R Act which provides that it is unlawful for a state to impose "any other tax which results in discriminatory treatment of a common carrier by railroad."[2] The "any other tax[es]" at issue

---

[2] Section 306 of Pub. L. 94-210 as a whole provides that:

> Sec. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:
>
> "Sec. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

here are imposed under Article 12A of Title 11 of the West Virginia Code, specifically W. Va. Code § 11-12A-2, the Carrier Gross Income Tax, and § 11-12A-3, the Carrier Net Income Tax. The parties agree

---

2 - cont'd

> "(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> "(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
>
> "(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.
>
> "(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.
>
> "(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that --

that these taxes are levied on the transportation income of railroads, as well as other carriers, in lieu of (or are another form of) business and occupation taxes levied generally, at varying rates, on the

---

2 - cont'd

> "(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;
>
> "(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;
>
> "(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;
>
> "(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and
>
> "(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such

gross incomes of other entities doing business within the state. See W. Va. Code § 11-13-1 et seq.; § 11-13-2d. Plaintiffs allege that the resulting tax burden on railroads is greater than that for other businesses.

---

2 - cont'd

> transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.
>
> "(3) As used in this section, the term --
>
> "(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;
>
> "(b) 'assessment jurisdiction' means a geographic area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;
>
> "(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and
>
> "(d) 'transportation property' means transportation property, as defined in regulations of

II.

Defendants' argument that this court should not take jurisdiction over this complaint because plaintiffs have failed to exhaust

---

2 - cont'd

> the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

The text of 49 U.S.C. § 11503, see note 1, supra, reads as follows:

> § 11503. Tax discrimination against rail transportation property
>
> (a) In this section --
>
> (1) "assessment" means valuation for a property tax levied by a taxing district.
>
> (2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.
>
> (3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> (4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.
>
> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

administrative remedies available to them by state statute contradicts the language of § 306(2) which states that:

> Notwithstanding any provision of section 1341 of title 28, United States Code, or of the

---

2 - cont'd

> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial

> constitution or laws of any State, the district courts of the United States shall have jurisdiction . . . to grant such . . . relief . . . as may be necessary to prevent, restrain or terminate any acts in violation of this section."

28 U.S.C. § 1341 generally prohibits federal courts from enjoining the collection of state taxes "where a plain, speedy and efficient remedy may be had in the courts of such State." The clear message

---

2 - cont'd

> and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section --
>
> > (1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and
> >
> > (2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.
>
> Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1445.

of § 306(2) is that Congress intended railroads to be able to seek an initial remedy under the federal statute without having to resort to state proceedings which might otherwise be available to them. See Clinchfield Railroad Co. v. Lynch, 527 F. Supp. 784, 785 (E.D.N.C. 1981) (and legislative history cited therein), aff'd 700 F.2d 126 (4th Cir. 1983).

The language of § 306(2) also suggests that a federal court should be chary of invoking the doctrine of abstention in a case brought under that statute. Abstention would have the effect of sending plaintiffs to state court, a route § 306(2) plainly indicates plaintiffs are not required to travel. Federal courts have a duty to adjudicate cases properly before them unless a significant interest such as "state-federal comity or . . . avoidance of constitutional decisions" would be clearly served by deference to state court proceedings under the judicially created doctrines of abstention and equitable restraint. Moses H. Cone Memorial Hospital v. Mercury Construction Co., 103 S. Ct. 926, 936 (1983), citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976).

Congress, in enacting § 306, has characterized the federal interests as paramount. See State of Arizona v. Atchison, Topeka and Santa Fe Railroad, 656 F.2d 398 (9th Cir. 1981). Here, as in Colorado River, supra, there is no federal constitutional issue which

might be mooted by a state court interpretation of state law. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). A state's tax structure is certainly a matter of state concern. See, e.g., Louisiana Light and Power Co. v. Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943). This case, however, does not require the court to interpret how the state intended the taxes at issue to be applied to the plaintiff railroads or to other businesses. The application is clear. See Western Maryland Railway Co. v. Goodwin, ___ W. Va. ___, 282 S.E.2d 240 (1981). Review of these taxes by this court may indeed disrupt state policy evidenced by them. See Burford, supra. Such disruption, however, is precisely the intent of the statute. This same principle negates the rationale for application of the doctrine of equitable restraint as invoked in Younger v. Harris, 401 U.S. 37 (1971), and its progeny.[3] See Juidice v. Vail, 430 U.S. 327, 333-37 (1977). See also Colorado River Water Cons. District v. United States, 424 U.S. at 818. The court recognizes that abstention has been applied in some 4-R Act cases, see e.g., Missouri Pacific Railroad Co. v. Tax Division of the Arkansas Public Service Comm., 504 F. Supp. 907 (E.D. Ark. 1980), but is not persuaded by the analysis found there.

Defendants' contention that the scope of § 306 is limited to property taxes or taxes in lieu of property taxes and accordingly

---

[3] It is not clear from the pleadings whether there are any current state proceedings with respect to plaintiffs' tax obligations.

does not reach the taxes at issue here is not untenable, but is not supported by the holdings of those courts of appeals which have addressed themselves to this issue. In Alabama Great Southern Railroad v. Eagerton, 663 F.2d 1036 (11th Cir. 1981), the state tax alleged to be discriminatory in its treatment of railroads was a license or privilege tax on the gross receipts of the railroads' intrastate business, a tax similar to the carrier taxes levied by West Virginia. The Eleventh Circuit found the words "any other tax" of § 306(1)(d) to be plain in their import: "It would be difficult to imagine statutory language that would be less needful of construction than the 'any other' language used here." 663 F.2d at 1040. Describing § 306(1)(d) as a "catchall provision," the court held that it was intended to reach any form of discriminatory taxation, not just property taxation as argued by the appellees. It noted that prior to passage of the 4-R Act, states could constitutionally, under the Equal Protection Clause of the Fourteenth Amendment, as well as under state constitutions, classify railroads differently from other taxpayers as long as the classification was rational. Under the Commerce Clause, however, Congress could prohibit any form of differential treatment of railroads as taxpayers. See P.L. 94-210, § 306(1); State of Arizona v. Atchison, Topeka and Santa Fe Railroad Company, 656 F.2d at 407.

The court in Eagerton relied on the holding in Ogilvie v. State Board of Equalization of the State of North Dakota, 657 F.2d 204 (8th Cir.), cert. denied, 454 U.S. 1086 (1981), in which the Eighth Circuit stated that the "purpose [of § 306, as revealed in its legislative history] was to prevent tax discrimination against railroads in any form whatsoever." 657 F.2d at 210 (emphasis supplied). In Ogilvie, North Dakota had argued that its tax system was equitable as between railroads and other commercial and industrial taxpayers because locally assessed businesses paid an annual business privilege tax in lieu of the personal property tax imposed on railroads and other centrally assessed businesses. The circuit court rejected this argument with the language quoted above. While the Ogilvie holding could be confined to taxes in lieu of property taxes, the Eleventh Circuit did not so construe it. Moreover, Ogilvie undercuts defendants' argument that § 306 is limited to property taxes because of § 306(2)(c) which denies relief unless there is at least a 5% disparity in assessed-to-true market value ratios as between transportation property and other commercial and industrial property. The Ninth Circuit has held that a literal reading of § 306(2)(c) would lead to an "absurd result," undermining Congressional recognition that discrimination could result from differential tax rates as well as valuation practices and Congress' intent to

provide a remedy for victims of discrimination. Trailer Train Co. v. State Board of Equalization, 697 F.2d 860 (9th Cir. 1983).

For purposes of this motion for judgment on the pleadings, the court must accept plaintiff's allegations of ultimate fact that the business and occupation tax system of West Virginia results in discriminatory treatment of railroads. See Beal v. Missouri and Pacific R.R. Corp., supra; 5 Wright and Miller, Federal Practice and Procedure, § 1368, 690-93 (1960). Further factual development is necessary to ascertain whether or not the carrier income taxes are discriminatory and, if so, the precise nature and extent of the discrimination. Also to be resolved is the question of whether the entire tax structure to which railroads and other commercial and industrial businesses are subject should be considered or only the carrier income and business and occupation taxes. See Alabama Great Southern Railroad Co, v. Eagerton, 663 F.2d at 1041. Defendants' argument that plaintiffs have failed to state a claim upon which relief can be granted because as a matter of law the carrier income tax is not discriminatory must therefore be rejected.

Further factual development is also necessary to properly assess defendants' fifth ground for judgment on the pleadings -- that the statute does not apply to tax years prior to the effective

date of the Act, February 5, 1979. Pub. L. 94-210, § 306(2)(b); 49 U.S.C. § 11503, Historical and Revision Notes. In their complaint, plaintiffs allege that notices of deficiency assessments of the carrier income tax were issued in September of 1982 against C & O and B & O for calendar years 1973 through 1976. C & O has also filed a claim, in June of 1982, for a refund of carrier net income taxes for the 1974, 1975, 1976, 1979 and 1980 calendar years.

In Trailer Train Co. v. State Board of Equalization, supra, the California State Board of Equalization recalculated, after the effective date of the Act, ad valorem taxes on private railroad cars, at a rate which was different from that at which the tax was originally levied and paid and which was allegedly discriminatory. When the railroads brought suit under 49 U.S.C. § 11503, the Board argued that the statute did not apply inasmuch as the additional tax was intended to correct a miscalculation of taxes owed on assessed values which had not changed. The Trailer Train court was not persuaded by this relation-back argument. It noted that § 11503(b), § 306(1)(a), prohibited not only discriminatory assessments but also collections based on discriminatory rates. It found that:

> Congress' purpose in postponing the effective date of § 11503 was to afford the states sufficient time to comply with the statute's prohibition against discriminatory tax treatment of railroad property. H. R. Rep. No.

> 725, 94th Cong., 1st Sess. 76 (1975). It was not to provide statues with an additional opportunity to impose and collect discriminatory taxes.

697 F.2d at 865.

It is not clear from the facts as pleaded here whether the deficiencies noticed are attributable to discriminatory tax rates. Moreover, in Trailer Train, a different rate was used for the recalculation; plaintiffs in this case have not asserted that the deficiencies resulted from use of a different rate than previously applied to the earlier tax years. It is also questionable whether the rationale of Trailer Train would reach tax years prior to 1976. See Trailer Train v. State Board of Equalization, 697 F.2d at 865, n.5. Additionally, § 306(1)(d) speaks to the "imposition of any other tax," not to "levy or collection," the language used in § 306(1)(b) and (c) which were the subsections invoked in Trailer Train.

III.

For the reasons stated above, it is ORDERED that defendants' motion for judgment on the pleadings be, and it hereby is, denied.

The Clerk is directed to forward certified copies of this order to all counsel of record.

DATED: August 22, 1983

JOHN T. COPENHAVER, JR.
United States District Judge

A TRUE COPY, Certified this
22nd day of Aug, 1983
RONALD D. LAWSON, CLERK
BY Ruth Blazek
DEPUTY